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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. 988

FRANK PETZELT,

Petitioner.

vs.

THEODORE J. MAYER,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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OPINION OF THE COURT BELOW.

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 311 F. 2d 601. The Opinion appears at page 1a of the appendix to this petition. No Opinion was rendered in the District Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The date of the judgment sought to be reviewed and the time of its entry is December 28, 1962. An order was entered on January 30, 1963 denying a petition for rehearing. The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

QUESTION ONE.

In entering judgment for the defendant notwithstanding the verdict, the District Court did not rule upon defendant's alternative motion for a new trial. Under these circumstances, does the reversal of the judgment by the Circuit Court of Appeals require the remandment of the cause to the District Court to rule upon the undisposed alternative motion for a new trial?

QUESTION TWO.

A. May the reviewing Court in a jury case reverse a judgment on "evidence" not heard by the jury?

B. May the reviewing Court in a jury case reverse a judgment on "evidence" not heard by the jury, without remanding the cause for a new trial?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The pertinent text of the constitutional provisions and statutes involved are set forth in the Appendix to this petition. Their citations are set forth below:

Federal Rules of Civil Procedure, Rule 50 (b), 28 U.S.C. (Appendix to this petition, page 13a);

Federal Rules of Civil Procedure, Adopted Amendments, by order of United States Supreme Court dated January 21, 1963, Rule 50 (c) and (d); see February 1, 1963 issue of the Supreme Court Reporter and the February 11, 1963 issue of L. Ed. 2d. (Appendix to this petition, page 14a);

Title 28 U.S.C., Sec. 1652 (Appendix to this petition, page 15a);

Constitution of the United States, Seventh Amendment (Appendix to this petition, page 12a).

STATEMENT OF THE CASE.

An appeal was taken to the United States Court of Appeals for the Seventh Circuit by the plaintiff following the second trial of a negligence personal injury action against a police officer. The jurisdiction of the Federal District Court of Illinois was invoked under Title 28 Sec. 1332, there being diversity of citizenship between the parties and the amount in controversy exceeding the jurisdictional requirements (App. Vol. 1, p. 11).

While driving at night in Crystal Lake, Illinois, plaintiff violated a traffic law. He then drove into a dark alley behind his hotel and defendant followed on his police department motor vehicle. While defendant was attempting to arrest plaintiff, the latter ran, fell in the alley and was injured, for which injuries this law suit was instigated.

The first trial was tried on both liability and damages. During the presentation of his case, plaintiff's attorney asked the plaintiff if he had any contact with the defendant police officer prior to the incident out of which the suit arose. Defendant's counsel objected, and the objection was sustained (App. Vol. 1, p. 22). Plaintiff's attorney made an offer of proof wherein he offered to prove by plaintiff that approximately four weeks prior to the incident in question, the defendant police officer had placed the plaintiff under arrest and that in the process, he dragged the plaintiff a distance of 100 feet. Also, that during the encounter, plaintiff's shirt was ripped from his back (App. Vol. 1, p. 124). This first trial resulted in a

$25,000 verdict for plaintiff, but defendant's motion for a new trial was allowed (App. Vol. 1, p. 24).

The second trial was tried on the issue of liability only. During the second trial, plaintiff's counsel made the same offer of proof referred to above that had been made at the first trial. This too, was excluded from the jury (App. Vol. 2, pp. 129-131). The jury returned a general verdict for plaintiff in the second trial.

Pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure, defendant filed, in addition to a motion for judgment notwithstanding the verdict, an alternative motion for new trial. Different grounds were set forth for each motion. (App. Vol. 1, pp. 36-43).

The District Court granted defendant's motion for a judgment notwithstanding the verdict, but it did not act upon defendant's alternative motion for a new trial (App. Vol. 1, pp. 42, 43).

The plaintiff appealed and the Circuit Court of Appeals reversed the judgment notwithstanding the verdict, basing the reversal of the judgment on the "evidence" of the prior incident the previous month (being the offer of proof referred to heretofore) which was excluded at the trial.

In reversing the judgment notwithstanding the verdict, nothing was done as to defendant's undisposed alternative motion for a new trial on the issue of liability, which is still pending in the trial court. The cause was remanded on the issue of damages only (311 F. 2d 601, at p. 603).

Defendant filed a petition for rehearing, noting to the Court that in entering judgment for defendant notwithstanding the verdict, the District Court did not act upon

defendant's alternative motion for a new trial. The defendant set forth that his motion for a new trial is still pending in the District Court, and that the reversal of the judgment notwithstanding the verdict requires the remandment of the cause to the District Court to act upon the undisposed alternative motion for a new trial on liability. The petition for rehearing was denied in all respects (see appendix to this petition, p. 9a).

REASONS FOR GRANTING THE WRIT.

IN RELATION TO QUESTION ONE.

A.

THE CIRCUIT COURT OF APPEALS HAS DECIDED A QUESTION ARISING UNDER THE FEDERAL RULES OF CIVIL PROCEDURE IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT AND FOUR DIFFERENT CIRCUIT COURTS OF APPEAL.

Pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure, the defendant filed, in addition to a motion for judgment notwithstanding the verdict, an alternative motion for a new trial. In entering judgment for the defendant notwithstanding the verdict, the trial court did not rule upon the alternative motion for a new trial.

On appeal by the plaintiff, the Circuit Court of Appeals reversed the judgment notwithstanding the verdict but nothing was done, by way of remandment or otherwise, with respect to the undisposed alternative motion for a new trial.

In denying defendant's petition for rehearing, the Circuit Court of Appeals rejected defendant's contention that under such circumstances, where a judgment notwithstanding the verdict is reversed, the case should be remanded to the trial court to act upon the pending alternative motion for a new trial.

This precise question was passed upon by this Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940), 61 S. Ct. 189, 85 L. Ed. 147. On this very point, the Court said (311 U.S. 243) at page 255:

"In the circumstances, we think the failure of the District Court to rule in the alternative on both matters can be cured without depriving the defendant of opportunity to have its motion for a new trial heard and decided by the trial court, by modifying the judgment below to provide that the cause be remanded to the District Court to hear and rule upon that motion."

Not only is the Circuit Court of Appeals in the instant case in open conflict with the decision of this Court in *Montgomery Ward & Co.* v. *Duncan*, it is also contrary to applicable decisions of four other Circuit Courts of Appeal. In the Fourth, Fifth and Tenth Circuits, and also in the Circuit Court of Appeals for the District of Columbia, the Courts held that in the circumstances mentioned, where the judgment notwithstanding the verdict is reversed, the case should be remanded to the trial court to act upon the undisposed motion for a new trial:

Fourth Circuit, *Tribble* v. *Bruin*, 279 F. 2d 424 (South Carolina, 1960); *Hawkins* v. *Sims*, 137 F. 2d 66 (West Virginia 1943);

Fifth Circuit, *Banks* v. *Associated Indemnity Corporation*, 161 F. 2d 305 (Louisiana, 1947); *Atkins* v. *Halliburton Oil Well Cementing Co.*, 196, F. 2d 876 (Louisiana 1952); *Pruitt* v. *Hardware Dealers Fire Ins. Co.*, 112 F. 2d 140 (Georgia, 1940), decided before *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 244 (1940), 61 S. Ct. 189, 85 L. Ed. 147.

Tenth Circuit, *Rednauer* v. *Commercial Standard Insurance Company*, 253 F. 2d 907 (Oklahoma, 1958);

District of Columbia, *Casper* v. *Barber & Ross Company*, 288 F. 2d 379 (1961); *Pessagno* v. *Euclid Inv. Co.*, 112 F. 2d 577 (1940), decided while certiorari was pending

in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 234 (1940), 61 S. Ct. 189, 85 L. Ed. 147.

In addition, in the Seventh Circuit itself, from which the instant case emanates, the Court on a prior occasion, under circumstances as are here present, held that the cause should be remanded to the trial court to act upon defendant's undisposed alternative motion for a new trial, *Vearn* v. *Crane*, 114 F. 2d 896 (Seventh Circuit Ill., 1940). The *Vearn* v. *Crane* case is especially interesting because in that case, the question as to what should be done with the undisposed motion for a new trial after the judgment notwithstanding the verdict was reversed, was raised for the first time in the petition for rehearing. On petition for rehearing, the Court held the case should be remanded to the trial court to rule on the alternative motion for a new trial.

In refusing to remand this cause to the trial court to rule upon the defendant's undisposed motion for a new trial, the Circuit Court of Appeals has violated an applicable decision of this Court arising under the Federal Rules of Civil Procedure; it has acted in conflict with the decisions of at least four other Circuit Courts of Appeal; and, moreover, it has not followed a prior decision of its own Circuit on the same question.

It is, therefore, necessary that a writ of certiorari be issued to determine whether this case, or any other case under similar circumstances, should be remanded to the District Court to act upon the undisposed motion for a new trial.

B.

IF MONTGOMERY WARD & CO. v. DUNCAN IS NOT DISPOSITIVE OF THIS CASE, THEN AN OPINION BY THIS COURT IS NEEDED TO SETTLE AN IMPORTANT QUESTION UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.

In this respect, it is important to note that the recent amendments to Rule 50 ((c) and (d)) as adopted by Order of this Court dated January 21, 1963, do not in fact change or alter the existing procedure to be followed by the trial court. Amendments (c) and (d) to Rule 50 merely add to the Federal Rules of Civil Procedure, what this Court announced in *Montgomery Ward & Co.* v. *Duncan* (311 U.S. 243, see pages 253, 254).

Therefore, the same questions respecting Rule 50 that existed since *Montgomery Ward & Co.* v. *Duncan* and prior to amendments (c) and (d) to Rule 50, are still extant. It follows that the question presented in this case is extremely important to any civil action that is hereafter tried in a federal court where Rule 50 is employed.

Since *Montgomery Ward & Co.* v. *Duncan*, at least four different Circuit Courts of Appeal (see this petition, page 8) have been asked, "What if the trial court does not, *in fact*, rule upon the alternative motion for a new trial and a judgment notwithstanding the verdict is reversed?"

Citing, and solely relying upon *Montgomery Ward & Co.* v. *Duncan*, the Courts of Appeal for the Fourth, Fifth, and Tenth Circuits, and for the District of Columbia, have uniformly held that under such circumstances the cause is to be remanded to the trial court to rule upon the undisposed motion for a new trial (see cases cited, this petition, page 8).

If these decisions, which rely upon a holding of this Court, are not correct, then an Opinion by this Court is needed to settle this important question arising under the Federal Rules of Civil Procedure.

IN RELATION TO QUESTION TWO.

A.

BY REVERSING A JUDGMENT IN A JURY CASE ON "EVIDENCE" NOT HEARD BY THE JURY, THE CIRCUIT COURT OF APPEALS HAS DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO A TRIAL BY JURY AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

In reversing the judgment notwithstanding the verdict on "evidence" not heard by the jury, and not considered by the trial court, the Circuit Court of Appeals has encroached upon the defendant's right to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States, which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

In reversing the judgment notwithstanding the verdict, but not remanding for a new trial on the issue of liability, the Circuit Court of Appeals concluded (311 F. 2d 601) at page 603:

> "We think the jury could on this evidence draw a reasonable inference that defendant should have foreseen, as a reasonably prudent man, that his conduct

> on the night in question, *in view of the incident the previous month*, would probably cause plaintiff, in fear for his safety, to leave the automobile, run away in the dark alley and be injured while running. This inference would support the finding of negligence." (Emphasis supplied)

The italicized part of the above quotation upon which the reversal of the judgment notwithstanding the verdict is based, was not admitted in evidence and was not heard by the jury. The Court makes this openly clear by employing a foot-note at page 602:

> "'The evidence of the prior incident was excluded at the trial. We think the ruling was erroneous because it has a bearing on plaintiff's mental state on the night of June 23. *Smith* v. *Cornell*, 59 Ill. 66 (1871), *Jennings* v. *Murphy*, 194 F. 2d 35, 37 (7th Cir. 1952), 2 *Jones, Evidence*, 1149 (2d ed. 1926), 18 *Illinois Law & Practice*, 193-94."

The reversal of the judgment notwithstanding the verdict based upon the Circuit Court of Appeals' own inference from "evidence" which was never heard by a jury constitutes an abridgement of the defendant's right to a trial by jury.

That the Circuit Court of Appeals' determination and inference of "evidence" not heard by a jury violates the Seventh Amendment to the Constitution of the United States is evident by what the Court said in *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364 (1912), 33 S. Ct. 523, 57 L. Ed. 879. In that case, where the Seventh Amendment was under consideration, quoting from another United States Supreme Court case, the Court said (228 U.S. 364) at page 378:

> "Its aim is not to preserve mere matters of form and procedure but substance of right. This requires

> that questions of fact in common law actions shall be settled by a jury, *and that the court shall not assume directly or indirectly to take from the jury itself such prerogative* * * *." (Emphasis supplied)

In this respect, it is interesting to note what the Supreme Court of Illinois has held with respect to a reviewing court considering "evidence" not submitted to a jury. In *Gundich* v. *Emerson-Comstock Co.*, 21 Ill. 2d 117 (1960), the Court held:

> "The Appellate Court also failed to realize that its determination of the ultimate facts in a jury case, *particularly from evidence not submitted to the jury*, would be an infringement of the jury function. (*Mirich* v. *Forschner Contracting Co.*, 312 Ill. 343.)" (Emphasis supplied)

In reversing the judgment notwithstanding the verdict on "evidence" not submitted to the jury, the Circuit Court of Appeals has not only infringed upon the jury function, it has, more importantly, deprived the defendant of his right to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

A writ of certiorari by this Court is necessary to protect the rights guaranteed the defendant by the Constitution of the United States.

B.

THE OPINION OF THE CIRCUIT COURT OF APPEALS IS IN PATENT CONFLICT WITH APPLICABLE DECISIONS OF THE STATE SUPREME COURT ON AN IMPORTANT QUESTION UPON WHICH THE STATE SUPREME COURT HAS TWICE REVIEWED AND REVERSED ITS OWN APPELLATE COURT.

The Circuit Court of Appeals reversed the judgment notwithstanding the verdict without remanding the cause

for a new trial on the issue of liability. The express circumstances under which this was done does violence to Title 28 U.S.C. Sec. 1652 on an important question which the Illinois Supreme Court has twice considered, and on each occasion has reversed its appellate court.

In *Gundich* v. *Emerson-Comstock Co.*, 21 Ill. 2d 117 (1960), (reversing 24 Ill. App. 2d 138), the Supreme Court of Illinois reversed the Appellate Court where a judgment notwithstanding the verdict was entered and held, on the issue here presented, at page 127:

> "We have indicated that the trial court rejected offers of proof on this issue made by the defendant. The Appellate Court found that such evidence was improperly excluded, and treated it as though it had been admitted, on the authority of language in two Appellate Court cases. (*Belorodker Loan & Investment Co.* v. *Goldenberg*, 253 Ill. App. 416; and *Gustin* v. *Bryden*, 205 Ill. App. 204.) The court apparently overlooked the case of *Dayton Scale Co.* v. *General Market House Co.*, 335 Ill. 342, decided by this court the same year as the *Belorodker* case, in which it was held that reversing without remanding on the basis of evidence improperly excluded by the trial court was error. The court in the *Dayton Scale Co.* case stated at p. 345: 'The evidence on which the Appellate Court based its judgment was not properly before that court and no opportunity had been given to the parties to introduce any and all evidence they might have on the point in dispute'."

Continuing, the Court said at page 128:

> "The Appellate Court also failed to realize that its determination of the ultimate facts in a jury case, particularly from evidence not even submitted to the jury, would be an infringement of the jury function (*Mirich* v. *Forschner Contracting Co.*, 312 Ill. 343). Moreover, the issue of the propriety of the admission or rejec-

tion of evidence is properly considered on a motion for a new trial, and not on a motion for judgment notwithstanding the verdict, which was involved herein. *Millikin Nat. Bank* v. *Shellabarger Grain Products Co.*, 389 Ill. 196, 200."

Dayton Scale Co. v. *General Market House Co.*, 335 Ill. 342 (1929) (reversing 248 Ill. App. 279) is another case where the Supreme Court of Illinois expressly and definitively held that where evidence is excluded by the trial court, if the exclusion is deemed improper by the reviewing court, that court may not reverse the judgment without remanding for a new trial. In that case, the Supreme Court of Illinois said at page 345:

> "When defendant in error offered in evidence the chattel mortgage and offered to prove the subsequent acts thereunder plaintiff in error objected, as it had a right to do. The trial court improperly sustained the objection. By this ruling the trial court excluded all evidence on the question whether or not plaintiff in error had precluded itself from denying the seller's authority to sell, which was the entire defense in the case. When the Appellate Court held that this evidence was improperly excluded it should have reversed the judgment and remanded the cause."

The Court then said:

> "If the evidence offered had been admitted by the trial court, plaintiff in error would then have had the right to offer any evidence in rebuttal which it might have had which tended to explain the alleged acts which it was claimed precluded it from recovering. When the objection was sustained all evidence on the main defense was not only excluded, but by the judgment of the Appellate Court plaintiff in error was barred of any right which it might have to recover. The evidence on which the Appellate Court based its judgment was not properly before that court and no

opportunity had been given to the parties to introduce any and all evidence they might have on the point in dispute."

The above holdings make it peremptorily clear that a reviewing court may not rule that evidence was improperly excluded from the jury by the trial court and then reverse the cause without remandment for trial, where the reviewing court's ruling is based on excluded evidence at the trial. Yet, this was precisely what the court below did in this case and its Opinion leaves no doubt about it.

If the Opinion of the court below is permitted to stand in its present form, there will exist an open repugnancy between it and the established law.

CONCLUSION.

It is respectfully submitted that for the reasons assigned, this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh District.

Respectfully submitted,

L. H. VOGEL,
Attorney for Petitioner.

DOM J. RIZZI,
Of Counsel.

(Appendix Follows)

APPENDIX.

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 13611 September Term, 1962 September Session, 1962

THEODORE J. MAYER,
Plaintiff-Appellant,

vs.

FRANK PETZELT,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

December 28, 1962

Before HASTINGS, *Chief Judge*, DUFFY and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is an appeal by plaintiff following the second trial of a diversity personal injury action against a Crystal Lake, Illinois, policeman. The first trial resulted in a $25,000 verdict for plaintiff, but a new trial was granted defendant. At the second trial on liability alone, the jury returned a general verdict for plaintiff with a special interrogatory against him on the question of due care. The District Court, notwithstanding the verdict for plaintiff, entered judgment[1] for defendant.

[1] Rule 50(b), FEDERAL RULES OF CIVIL PROCEDURE

Opinion of the United States Court of Appeals

While driving at night in Crystal Lake, plaintiff violated a traffic law. He then drove into a dark alley behind his hotel, and defendant followed on his police department motorcycle. While defendant was attempting to arrest plaintiff, the latter ran, fell in the alley, and was injured.

The vital issue is whether the alleged negligence of the defendant Crystal Lake policeman is actionable in Illinois.

We think the defendant, under Illinois law, can be held liable. And the District Court, sitting as "only another" Illinois court, *Allstate Insurance Co.* v. *Charneski*, 286 F. 2d 238, 244 (7th Cir. 1960) in this diversity case, erred if it rested its decision upon the ground that defendant's negligence was not actionable.

Illinois courts hold individual policemen liable for wrongs committed in performance of their official duty.[2] *Hood* v. *Brinson*, 30 Ill. App. 2d 498, 175 N. E. 2d 300 (1961), *La Cerra* v. *Woodrich*, 321 Ill. App. 107, 52 N. E. 2d 461 (1943), *Styblo* v. *McNeil*, 317 Ill. App. 316, 45 N. E. 2d 1011 (1943), *Wisher* v. *City of Centralia*, 273 Ill. App. 168, 176-77 (1933), *City of Chicago* v. *Williams*, 182 Ill. 135, 137, 55 N. E. 123, 124 (1899), *Board of Trustees* v. *Schroeder*, 58 Ill. 353, 355 (1871). In 1955 the rule was specifically recognized by the Illinois Supreme Court in *Gaca* v. *City of Chicago*, 411 Ill. 146, 155, 103 N. E. 2d

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[2] See 8 ILLINOIS LAW & PRACTICE 683-85.

[3] "It [the statute requiring municipalities to indemnify policemen for tort judgments rendered against them] does not change the general tort liability of a policeman." 411 Ill. 146, at 155; 103 N. E. 2d 617, at 623.

617, 623 (1952), and is expressed in Judge Schaefer's dissent in that case.[4]

An exception to the rule was announced, without authority, in *Taylor* v. *City of Berwyn*, 372 Ill. 124, 22 N. E. 2d 930 (1939), on which defendant mainly relies. However, subsequent legislation and the cases cited show that *Taylor* is not the law of Illinois.[5] Moreover, since 1945, the Illinois General Assembly has consistently presupposed the general tort liability of policemen, in providing that certain municipalities must *indemnify* policemen for tort judgments rendered against them.[6]

The District Court erred also if it found that the evidence failed to establish liability.

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[4] "The policeman, however, has been individually liable for his tort, notwithstanding he commits it while engaged in the performance of a governmental function." 411 Ill. 146, at 159; 103 N. E. 2d 617, at 625.

[5] In 1943, the Illinois General Assembly enacted §1-15 of the Cities & Villages Act, Chapter 24, ILLINOIS REVISED STATUTES. That Act, applicable in effect only to Chicago, by rendering the municipality "only" liable, implicitly excluded policemen from liability for negligence in driving motor vehicles in performance of their duties. By inference, it gave statutory force to the rule expressed in *Taylor*. In 1945, however, the legislature amended §1-15 by cutting out the qualification municipality "only" and provided that municipalities of over 500,000 population should indemnify policemen for *any* judgment rendered against *him* as a result of injury inflicted in performance of duty, excepting wilful misconduct. In 1957, the General Assembly broadened the indemnification statute, by the addition of a section, to cover all municipalities.

[6] 1961 ILLINOIS REVISED STATUTES §§1-4-5, 1-4-6.

Opinion of the United States Court of Appeals

The most favorable view of the evidence[3] for plaintiff is: On the night of his injury, plaintiff had illegally crossed the center line in making a wide right turn. Afterward he drove into the dark alley behind his hotel, parked and turned out the car lights. He then recognized, standing by his car, defendant, who had, about a month before, pursued plaintiff for "telling a lie," caught him and dragged him back to the police station ripping his shirt off in the process.[4] Defendant, then a man of 27 who weighed 190 pounds, said to plaintiff, a man of 64, "You ...., now I got you where I want you, and you come out of that car and you are going to get it." Defendant did not have his flashlight or ticket book with him at the time. While "hollering" and shaking plaintiff's car, defendant tried to open the locked doors. When defendant went to the right side, plaintiff got out the left, ran down the alley and was injured. Defendant later told a fellow officer that he "• • • must have scared hell out of him because he started to run from me."

We think the jury could on this evidence draw a reasonable inference that defendant should have foreseen, as a reasonably prudent man, that his conduct on the night in question, in view of the incident the previous month, would

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[3] 5 MOORE, FEDERAL PRACTICE, 2346-47 (2d ed. 1951).

[4] The evidence of the prior incident was excluded at the trial. We think the ruling was erroneous because it has a bearing on plaintiff's mental state on the night of June 23. *Smith* v. *Cornell*, 59 Ill. 66 (1871), *Jennings* v. *Murphy*, 194 F. 2d 35, 37 (7th Cir. 1952), 2 JONES, EVIDENCE, 1149 (2d ed. 1926), 18 ILLINOIS LAW & PRACTICE, 193-94.

probably cause plaintiff, in fear for his safety, to leave the automobile, run away in the dark alley and be injured while running. This inference would support the finding of negligence. *Karas* v. *Snell*, 11 Ill. 2d 233, 142 N. E. 2d 46, 56 (1957), *Hood* v. *Brinson*, 30 Ill. App. 2d 498, 175 N. E. 2d 390 (1961).

We need not refer to the cases cited by defendant with respect to liability for negligence causing mental suffering unaccompanied by physical injury. The recovery at bar was not sought for plaintiff's fear, but for a broken leg. And *Braun* v. *Craviu*, 175 Ill. 401, 420, 51 N. E. 657, 661-2 (1898) has no force after *Knierim* v. *Izzo*, 22 Ill. 2d 73, 174 N. E. 2d 157 (1961). In our opinion, an Illinois court would decide, as we do, that the jury could reasonably conclude that defendant's negligence was the proximate cause of plaintiff's injury and that defendant is liable. *Elgin, A. & S. Traction Co.* v. *Wilson*, 217 Ill. 47, 55, 75 N. E. 436, 439 (1905), *Brouchack* v. *Frailey*, 78 Ill. App. 262 (1898).*

Implicit in the general verdict for plaintiff is a finding of absence of contributory negligence. *Theurer* v. *Holland Furnace Co.*, 124 F. 2d 494, 497 (10th Cir. 1941). But a special interrogatory answered in the negative the question: "Did the plaintiff use ordinary care and caution for his own safety on the occasion in question?" This interrogatory is not inconsistent with the general verdict because, even though the jury might believe plaintiff was

* See, in general, 15 Illinois Law & Practice 489, Prosser, Torts 178-80 (1955 ed.); 29 Chicago-Kent Law Review 189 (1951), 48 Northwestern U. Law Review 377 (1954).

guilty of lack of due care, it might also believe that plaintiff's actions were not the proximate cause of his injury.[10] Furthermore, the District Court would not be justified in deciding that plaintiff's conduct proximately caused the injury, and entering judgment on the interrogatory. The jury had a right to consider the circumstances under which plaintiff acted, and could find that he fled in fear with no free opportunity to choose his precise path of escape. *Hackett* v. *Chicago Indianapolis & Louisville Railway*, 170 Ill. App. 140, 148 (1912), *affirmed*, 228 U.S. 559 (1913).[11]

We hold that the District Court erred in entering judgment notwithstanding the verdict. Plaintiff seeks reversal of the order which granted a second trial. We have considered the order, but we are not disposed, on the grounds asserted, to speculate upon the propriety of the District

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[10] "It is plain that the general verdict must yield when it is so clearly at variance with one or more of the [special interrogatory] answers that the two are irreconcilable in a legal sense. But every reasonable intendment in favor of the general verdict should be indulged in an effort to harmonize the two. The answers override the general verdict and warrant the entry of judgment in disregard of the latter only where the conflict on a material question is beyond reconciliation on any reasonable theory consistent with the evidence and its fair inferences." *Thearer* v. *Holland Furnace Co.*, 124 F. 2d 494, 498 (10th Cir. 1941).

[11] "A person confronted with a sudden or imminent peril is not required by law to do any particular thing, or to omit to do any particular thing, for his own safety. An act done under such circumstances may not constitute contributory negligence * * *." 28 ILLINOIS LAW & PRACTICE 123.

Court's exercise of discretion. For the reasons given, the judgment is REVERSED, and the cause is REMANDED for trial upon the issue of damages only.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Order of the United States Court of Appeals

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago 10, Illinois

Friday, December 28, 1962

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

No. 13611

THEODORE J. MAYER,
Plaintiff-Appellant,

vs.

FRANK PETZELT,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and it is hereby, Remanded to the said District Court for trial upon the issue of damages only, in accordance with the opinion of this Court filed this day.

Order of the United States Court of Appeals

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago 10, Illinois

Wednesday, January 30, 1963

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

No. 13611

THEODORE J. MAYER,
Plaintiff-Appellant,

vs.

FRANK PETZELT,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

Order of the United States District Court

In The
UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

THEODORE J. MAYER,
Plaintiff
vs,
FRANK PETZELT,
Defendant
No. 58 C 1109

ORDER.

This cause having come on to be heard for a ruling on the Motion of Frank Petzelt, Defendant, for judgment notwithstanding the general verdict and in conformity with the response of the jury to the special interrogatory, or in the alternative for judgment of a directed verdict in favor of Defendant under Rule 50(b) of the Rules of Civil Procedure for United States District Courts, or in the alternative for a new trial, the Court having read the Motion and having read and considered Briefs filed in support of and in opposition to said Motion, and the Court, under the Rules of Civil Procedure above mentioned, having reserved its ruling on the Motions for a Directed Verdict made by and on behalf of the Defendant at the close of all the evidence introduced by the Plaintiff and again at the close of all of the evidence in the case, and finding that it has jurisdiction of the parties and of the subject matter,

It Is Hereby Ordered And Adjudged that the Motion of Defendant, Frank Petzelt, for judgment under Rule 50(b)

of the Rules of Civil Procedure for United States District Courts be, and it is hereby sustained.

It Is Further Ordered And Adjudged that Defendant, Frank Petzelt, have judgment in his favor under Rule 50(b) of the Rules of Civil Procedure for United States District Courts, notwithstanding the general verdict of the jury, and that Plaintiff take nothing by his suit and that Defendant, Frank Petzelt, go hence without day and have judgment for his costs against Plaintiff, Theodore J. Mayer.

Enter: /s/ J. M. Miner
Judge

Dated: October 30, 1961

CONSTITUTIONAL PROVISIONS AND STATUTES CITED.

Constitution of the United States, Seventh Amendment—

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by the jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Federal Rules of Civil Procedure, Rule 50(b), 28 U.S.C.—

> "(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the al-

ternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Federal Rules of Civil Procedure, Adopted Amendments, Rule 50 (b), (c), and (d)—

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was

returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

"(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict."

"(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the

party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted."

Title 28 U.S.C. Sec. 1254(1)—

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1). By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Title 28 U.S.C. Sec. 1652—

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

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Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

NO. 988

FRANK PETZELT,

Petitioner,

vs.

JOSEPH T. LOCHEN, Administrator of the Estate of Theodore J. Mayer, Deceased,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI.

WILLIAM C. WINES,
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CHAMPLIN-DONALY COMPANY, CHICAGO 1963

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

NO. 988

FRANK PETZELT,

Petitioner.

VS.

JOSEPH T. LOCHEN, Administrator of the Estate of Theodor J. Mayer, Deceased,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI.

ARGUMENT.

I.

THIS CASE PRESENTS NO QUESTION WORTHY OF CERTIORARI.

On the first trial of this cause, the jury's verdict in favor of the plaintiff below was set aside and a new trial granted. On the second trial of this cause, the District Judge, the Honorable Julius H. Miner, who died in March of this year,

set aside the jury's verdict in favor of the plaintiff below and entered a judgment notwithstanding the verdict for the petitioner.

To be sure, Judge Miner, having allowed petitioner's motion for judgment notwithstanding the verdict, did not rule upon petitioner's alternative motion for a new trial. But petitioner, having won his case outright in the District Court on his motion for judgment notwithstanding the verdict, made no motion or request, nor did he even suggest in the trial court that that court should rule upon his alternative motion for a new trial. And petitioner, thus having prevailed completely below, did not even suggest in the Court of Appeals that the District Court should have ruled upon his alternative motion until after that court had reversed the District Court's judgment.

Thus the instant case differs signally from *Montgomery Ward & Company* v. *Duncan*, 311 U. S. 243, in which this court did indeed hold that even though a Federal District Judge allows a motion for a judgment for the defendant notwithstanding the verdict, thus completely disposing of the case so far as the District Court is concerned, the court should also rule upon an alternative motion for a new trial.

But in the *Montgomery Ward* case a motion was made in the trial court requesting a ruling on the motion for new trial "in order to limit the issues on appeal" but the trial court *declined* to enter such an order.

Generally, a party cannot complain of a lower court's failure to rule upon a motion where no request for ruling is made even though the motion does appear in the files. The party who deems himself aggrieved by the absence of a ruling on a motion or an objection must request a ruling or the point is waived.

There is not the slightest doubt that if the petitioner had suggested to the District Court that it should rule upon his alternative motion for a new trial, that court would have ruled thereon. But the petitioner preferred to acquiesce in the trial court's silence upon this motion for new trial until the plaintiff had gone to the expense of an appeal after two verdicts in his favor. And now the plaintiff, Theodore Mayer, is deceased, having died in February of this year.

The petitioner would have the plaintiff's administrator try the case a third time, should his motion now be granted, with the prospect of a second appeal, when it would have been so easy for the defendant to have requested a ruling from the District Judge.

Had the defendant requested such a ruling and *had the District Court refused to accede to the request*, then, perhaps, granting of certiorari might be appropriate to compel compliance with this Court's opinion in the *Montgomery Ward* case.

But this case presents the antithesis of the factual situation occurring in the *Montgomery Ward* case.

It involves only a question of the Illinois substantive Law measuring liability of police officers for negligence. That law has been conclusively settled by the decisions of the Supreme and Appellate Courts of Illinois cited in the opinion of the Court of Appeals; *Karas* v. *Snell*, 11 Ill. 2d 233, 142 N. E. 2d 46; *Hood* v. *Brinson*, 30 Ill. App. 2d 498, 175 N. E. 2d 300; *Gacc* v. *City of Chicago*, 411 Ill. 146, 103 N. E. 2d 617.

Petitioner makes a point that the Court of Appeals erred because, so petitioner incorrectly says, that court based its judgment of reversal upon evidence which was tendered to the trial court but excluded and hence was not heard by the jury. But petitioner has simply misread the opinion of the Court of Appeals.

The evidence to which petitioner alludes was an offer of proof that the plaintiff and petitioner had had a previous altercation. This evidence was tendered upon the theory that the plaintiff reasonably feared violence at the hands of petitioner and so was not guilty of the contributory negligence with which petitioner charged him.

It is true that the Court of Appeals said, manifestly correctly, that this evidence should have been admitted.

But it is clear from a reading of the opinion of the Court of Appeals that it held (1) that a jury might reasonably have found, as in fact two juries have found, that petitioner frightened the plaintiff by needless menacing language, (2) that such conduct represents actionable negligence under Illinois law, and (3) that the elderly plaintiff was not guilty of contributory negligence in leaving his car and fleeing in fright into a dark and dangerous alley.

Nothing in this holding call for certiorari.

CONCLUSION.

For the reasons set forth in this brief, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

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